

ZONING BOARD OF ADJUSTMENT

MINUTES

FEBRUARY 18, 2015

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, February 18, 2015 at the Conway Town Office in Center Conway, NH, beginning at 7:00 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Dana Hylen; Alternate, Martha Tobin; Alternate, Steven Steiner; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

APPOINTMENT OF ALTERNATE MEMBERS

Ms. Sherman appointed Ms. Tobin and Mr. Steiner as a voting member.

PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider a **VARIANCE** requested by **ROBERT DURKEE** in regards to §147.13.15.5 of the Conway Zoning Ordinance **to allow a 233 square foot expansion of the existing concrete pad around a pool within the Shoreline Protection Overlay District** at 82 Morrill Lane, Conway (PID 267-24). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, February 6, 2015.

Robert Durkee appeared before the Board. Mr. Durkee stated he received a letter from his insurance company that a fence was needed around the pool or he would lose his insurance. Mr. Durkee stated he is looking to expand the existing concrete and install a fence; trying to bring the concrete out to where the fence will be installed. Mr. Durkee stated there is an existing concrete pad around the pool, just looking to expand it.

Mr. Chalmers asked if there is no other way to enclose the pool. Mr. Durkee stated he would still have to have footings for the fencing; don't know how to do it without fencing in the entire property. Ms. Tobin asked if he could just install a fence around what is already there. Mr. Durkee stated it is so short it would create other safety hazards. Mr. Durkee stated he has a current shoreland application that has been approved through the State. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Chalmers stated it is contrary to the ordinance to allow construction within the shoreland setback. **Motion carried with Ms. Tobin and Mr. Chalmers voting in the negative.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Ms. Tobin and Mr. Chalmers voting in the negative.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Tobin, that substantial justice is done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; Ms. Tobin stated she is going to abstain from voting as she does not have enough information on this issue. **Motion carried with Ms. Tobin abstaining from voting.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.** Ms. Sherman asked for Board comment; Ms. Tobin stated she doesn't see any hardship. **Motion carried with Ms. Tobin and Mr. Chalmers voting in the negative.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Ms. Sherman asked for Board comment; there was none. **Motion carried with Ms. Tobin and Mr. Chalmers voting in the negative.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Ms. Tobin, that item 5.b was not necessary.** **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Chalmers, that, based on the forgoing findings of fact, the variance from §147.13.15.5 of the Town of Conway Zoning Ordinance to allow a 233 square foot expansion of the existing concrete pad around a pool within the Shoreline Protection Overlay District be granted. **Motion carried with Ms. Tobin and Mr. Chalmers voting in the negative.**

A public hearing was opened at 7:09 pm to consider a **VARIANCE** requested by **ROBERT AND JOYCE CICCOLO** in regards to §147.14.2.2.5 of the Conway Zoning Ordinance **to allow the raising of an existing structure to obtain first floor elevation above the 100-year flood elevation** at 90 Brookview Road, Conway (PID 250-181). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, February 6, 2015.

Dana Hysten joined the Board at this time and became a voting member. Ms. Sherman appointed Ms. Tobin as a voting member; Mr. Steiner became a non-voting member at this time. Ron Briggs of Briggs Land Surveying appeared before the Board. Robert Ciccolo was in attendance.

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Mr. Briggs stated the first floor elevation is actually above the flood elevation; but on at least two occasions they have had water in the first floor. Mr. Briggs stated they would like to raise the building about 30 inches; the first floor is currently at 459.7' and it would be at 462.5' which would be adequate to avoid flooding of the first floor. Mr. Briggs stated water is coming in higher than the base flood elevation. Mr. Irving stated staff has no issue with this request. Ms. Tobin asked if they would be building the foundation up. Mr. Brigg answered in the affirmative. Mr. Irving stated the foundation will be constructed and designed with FEMA guidelines. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Tobin, that substantial justice is done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Mr. Hylen, that no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Ms. Tobin voting in the negative.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Tobin, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Hylen, that item 5.b was not necessary.** **Motion unanimously carried.**

Ms. Sherman read item. 6. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 7. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that item 7 is not necessary.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 8. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the variance is necessary, considering the flood hazard, to afford relief.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Tobin, that, based on the forgoing findings of fact, the variance from §147.14.2.2.5 of the Town of Conway Zoning Ordinance to allow the raising of an existing structure to obtain first floor above the 100-year flood elevation be granted. Motion unanimously carried.

A public hearing was opened at 7:20 pm to consider a **SPECIAL EXCEPTION** requested by **KELLIE JOHNSON** in regards to §147.13.5.2.5.2 of the Conway Zoning Ordinance **to allow an accessory apartment** at 1615 East Main Street, Center Conway (PID 260-44). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, February 6, 2015.

Ms. Sherman appointed Mr. Steiner as a voting member; Ms. Tobin became a non-voting member at this time. Kellie Johnson appeared before the Board. Ms. Sherman stated it is already there so it likely architecturally compatible with the neighborhood. Ms. Sherman asked if there is sufficient parking. Ms. Johnson answered in the affirmative. Mr. Colbath asked the size of the accessory apartment. Ms. Johnson answered 630 square feet. Ms. Sherman asked for public comment; Timothy Goodson stated that he lives next door and thinks the request should be approved.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the apartment is accessory to an owner-occupied single family dwelling.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the apartment is no less than 300 square feet and no greater than 800 square feet.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the apartment is architecturally compatible with the neighborhood.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Hylen, that sufficient parking is located on site.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Mr. Colbath made a motion, seconded by Mr. Hylen, that, based on the forgoing findings of fact, the Special Exception pursuant to §147.13.5.2.5.2 of the Town of Conway Zoning Ordinance to allow an accessory apartment be granted. Motion unanimously carried.

A public meeting was opened at 7:30 pm in accordance with the Court Order dated January 16, 2015 by presiding Justice David Garfunkel to clarify for the Court the Board’s decision with respect to traffic in regards to §147.14.1.2 of the Conway Zoning Ordinance **to change a non-conforming use, a racquet club, lounge/restaurant and fitness center, to another non-conforming use, a hotel**, at 110 Barnes Road, North Conway (PID 235-82).

Peter Malia, Town Attorney, appeared before the Board. Derek Lick of Sulloway & Hollis; and James Rines with White Mountain Survey and Engineering representing Barnes Development LLC were in attendance. John Arnold of Hinckley Allen representing Bellevue Properties was in attendance.

Mr. Malia stated this was a special exception request to convert one nonconforming use, a racquet ball club, lounge/restaurant and fitness center, to another nonconforming use, a hotel, approved in January 2014. Mr. Malia stated the Judge remanded this back to the Board in regard to §147.14.1.2.2.3, traffic. Mr. Malia stated the issue is whether the hotel had the same or lesser impact on the neighborhood relative to traffic. Mr. Malia stated the Judge wants the Board to clarify their position that it either would not increase traffic or the potential increase is so slight that it won’t have any impact on the neighborhood.

Derek Lick stated that his client would like to request that the Board amend the approval to only 104 rooms as 104 rooms will not exceed traffic calculations. Mr. Lick asked to submit materials to the Board that has the same information presented at the original hearing with the exception of requesting the approval be amended to 104 rooms. Mr. Chalmers asked if it is the same traffic information. Mr. Lick answered in the affirmative and stated the only difference is rather than 116 rooms it is for 104 rooms. Mr. Irving stated the applicant would not be adverse to the Board reducing the number of rooms. Mr. Lick stated it would not have an impact on the neighborhood, and we want to alleviate that and make it the simple.

Mr. Malia asked if the Board would like to take what Mr. Lick has and put it in the certified record. The Board agreed to give it to Mr. Malia and for the record. Mr. Lick submitted a letter dated 2/18/15 to Mr. Malia and Ms. Meserve for the record. Mr. Colbath stated the Board is only considering tonight whether there would be no increase or a slight increase that the traffic would be insignificant. Mr. Malia answered in the affirmative. Mr. Irving stated the remand gives the Board an opportunity to change its decision, clarify its decision or both. Mr. Malia agreed. Mr. Malia stated that the Judge is looking for the Board’s underlying decision.

After a review of the Board members who attended the hearing in January 2014 Ms. Sherman appointed Ms. Tobin as a voting member and Mr. Steiner as a non-voting member.

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Mr. Arnold stated in relation to limiting the hotel rooms to 104, the way the applicant came up with that number was to look at the traffic generation for the fitness club and then back the number of rooms into that count. Mr. Arnold stated they provide weekday and Sunday traffic counts, but nothing on Saturday traffic. Mr. Arnold stated when we look at the trip generation manual; Mr. Irving asked Mr. Malia if Mr. Arnold was getting into new information as this is a public meeting and not a public hearing. Mr. Malia stated we need to limit the discussion to the record that was presented to the Board and the Judge.

Mr. Arnold stated the he wants to submit rebuttal based on the information that was submitted tonight by Mr. Lick. Mr. Arnold stated there was nothing presented for Saturday and that is the highest count for a hotel, 852 trips, and the lowest for a fitness center. Mr. Arnold stated a hotel will generate 158% more traffic than the fitness center on a Saturday. Mr. Arnold stated we are not talking about a handful of cars; if you used the actual counts it would end up being a 66 room hotel. Mr. Arnold stated the information that the applicant presented to you omits the most important day on an important decision that is being made. Mr. Arnold stated that the Board is not looking at the full picture in regard to traffic.

Mr. Hylen stated that he would have to agree with Mr. Arnold. Mr. Hylen stated Saturday morning check in is the busiest day of the week; if that was not presented to the Board before then the Board should revisit it. Mr. Hylen stated including Saturday counts would significantly change the numbers. Mr. Arnold stated he would like to submit report. Mr. Malia stated this would be a new report. Ms. Sherman stated that this would be new information. Mr. Chalmers stated he feels the Board has crossed that line where we have new testimony that was not presented at the first meeting. Mr. Arnold stated Saturday information was available to the applicant, but this is new to Bellevue.

Mr. Steiner referred to the Residences Inn and they don't have a traffic issue; he personally doesn't see how there would be a problem with traffic. Mr. Malia asked if the Board would like to look at Saturday traffic counts; hold a public hearing and re-notify abutters. Mr. Lick stated they would do as the Board wishes, but Bellevue Properties has already appealed. Mr. Lick stated that they accept the representation of 852 trips on a Saturday; on a weekday based on the calculation it would generate 850 trips per day. Mr. Lick stated that it is our position that it is not significant on the impact to the neighborhood. Mr. Arnold stated there is a big difference to the prior use of what the fitness center was generating on a weekend. Mr. Arnold stated it is a big change from what was there and to what is proposed.

Ms. Tobin stated that she thinks this needs to be re-noticed. Mr. Colbath asked if it would be a whole new hearing. Mr. Malia stated it would be limited to traffic and the Board would be able to receive Mr. Arnold's information. Mr. Irving stated the Board could just do what the Judge asked for, and leave it at that. Mr. Colbath stated that he is leery of opening another can of worms; we've heard the facts before and don't think the reports, in his opinion, are going to change.

Ms. Sherman stated in regard to the traffic report the Board wasn't going for specific days, but the overall. Ms. Sherman stated if we did that it probably would be different for vacation weeks. Mr. Arnold stated that the applicant has presented traffic numbers for weekdays and

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Sundays; the 116 room that they came up with were based on Sunday traffic numbers and the 104 rooms they agreed to tonight would be the maximum day of a weekday. Mr. Arnold stated if they are willing to reduce to weekday then there is no reason to consider Saturday and back into that number. Mr. Hylen stated he would agree with Mr. Arnold.

Mr. Chalmers stated that he doesn't disagree, but it was remanded back to the Board based on the information that we heard at the hearing. Mr. Chalmers stated we made this decision on the testimony at the time of the hearing and felt the traffic was insignificant; think that is the clarification the Judge is looking for. Mr. Arnold stated he is not sure if it was intentional or not, but the biggest piece of information was omitted. Mr. Lick stated if 852 trips are generated on a Saturday, the Board can easily say it is not an impact if it would generate 850 trips during a week day.

Mr. Malia stated the Judge wanted the Board to clarify traffic and if lacking information on Saturday and want that information then the Board could hold a public hearing; if the Board wants to get it back to the judge, the judge just asked for a clarification on the basis of the Board's opinion and we have that information to make that decision.

Mr. Hylen stated when the decision was made the Board may not have had all the information to answer the Judge's question accurately. Ms. Tobin stated she would withdraw her request for a new public hearing and thinks the Board has the information to make that clarification for the Judge.

Mr. Arnold stated in the ZBA rules it requires new information to be submitted seven days before the meeting; the information submitted by Mr. Lick this evening contains an argument at the bottom. Mr. Arnold stated since this was just given to the Board it should be noticed for a public hearing. Ms. Sherman stated it was not given to the Board; only to Mr. Malia and Ms. Meserve for the record. Mr. Lick stated he would withdraw the materials that were just submitted, which the Board has not seen. Both copies were given back to Mr. Lick.

Mr. Hylen made a motion, seconded by Mr. Chalmers, to hold a public hearing to address traffic and revisit the traffic question regarding this application. Motion defeated with Mr. Hylen voting in the affirmative and Ms. Tobin, Mr. Chalmers, Mr. Colbath and Ms. Sherman voting in the negative.

Ms. Tobin made a motion, seconded by Mr. Chalmers, that the ZBA found that any potential increase in traffic would be so slight that its impact on the neighborhood would not increase. Motion carried with Mr. Hylen abstaining from voting. Ms. Sherman stated the Board did not consider the traffic to be a substantial increase; it was so slight that it would not make a difference.

Mr. Malia asked about the concession to 104 rooms. Mr. Irving stated that request was withdrawn.

REVIEW AND APPROVAL OF MINUTES

Ms. Sherman appointed Mr. Steiner as a voting member; Ms. Tobin became a non-voting member. **Mr. Colbath made a motion, seconded by Mr. Steiner, to approve the Minutes of December 10, 2014 as written. Motion carried with Ms. Sherman abstaining from voting.**

Meeting adjourned at 8:11 pm.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Holly L. Meserve".

**Holly L. Meserve
Recording Secretary**